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IN THE
COURT OF APPEALS OF INDIANA

DANIEL COOK,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 29A05-0603-CV-128
	)	
STEPHANIE COOK,	)	
	)	
Appellee-Respondent,	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith Proffitt, Judge
Cause No. 29C01-0001-DR-36

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary

Daniel Cook appeals from the trial court's order finding him in contempt for failure to pay amounts ordered in his divorce decree, and denying his motions to find his former wife, Stephanie Cook, in contempt. The trial court also modified Daniel's parenting time, and ordered him to pay a portion of Stephanie's attorney fees. Because Daniel's parenting time as originally ordered posed a risk to the emotional health of his children, the trial court properly exercised its discretion in modifying it. However, the trial court abused its discretion when it delegated to the family counselor the ability to make gradual increases in Daniel's parenting time. Stephanie's actions withholding Daniel's parenting time without authorization or modification by the trial court constituted contempt of the decree, but the trial court's failure to so find was harmless error in light of the eventual outcome. Lastly, the trial court did not abuse its discretion in deciding to award payment of approximately half of Stephanie's attorney fees and legal costs. For these reasons, we affirm in part and reverse in part.

Issues

Daniel raises four issues for our review, which we condense, reorder, and restate as follows:

1. Whether the trial court properly modified Daniel's parenting time;

2. Whether the trial court properly denied Daniel's motions to find Stephanie in contempt; and

3. Whether the award of attorney fees to Stephanie was appropriate.

Facts and Procedural History

Daniel and Stephanie, who had four children from their marriage, were divorced and

entered into a property settlement agreement on March 9, 2001. Stephanie was awarded custody of all the children, until June of 2001 when Daniel was given custody of only their oldest son. The terms of visitation as established by the parties dictated, "Visitation shall be as the parties shall from time to time agree, but shall be governed by the Marion County Visitation Guidelines in the event the parties are unable to agree." Appellant's Appendix at 29. The parties formed a general understanding that Daniel would have visitation every other Friday, from Friday evening until Sunday evening. Appendix to Appellee's Brief at 32.

In the fall of 2002, roughly coinciding with the timing of his second marriage, Daniel severely limited his visitation with his children. He regularly failed to pick up the children for scheduled midweek or weekend visits, did not attend their extracurricular events, and did not notify them of or invite them to his second marriage. He also limited communication with the children by sending them very little written correspondence. This trend continued until the fall of 2004, approximately when his second divorce became finalized. At that time, after a two-year period of absence, Daniel demanded Friday-to-Sunday visitation with the children. Stephanie proposed starting with small visits and building up to eventual overnight visitation because the children expressed concern about spending overnights with Daniel. The two parties did not reach an agreement, and Stephanie refused Daniel's requests for overnight parenting time, although he visited with the children at the mall during the Saturday or Sunday of alternating weekends.

Between October 29, 2004, and November 24, 2004, Daniel filed six motions: a Motion to Find Petitioner in Contempt of Court Ordered Visitation by Abduction, a Motion to Find Petitioner in Contempt of Court Ordered Visitation by Reason of Criminal

Confinement, a Motion to Find Petitioner in Contempt of Court Ordered Visitation, an Application for Permanent Injunction, a Motion for Clarification of Visitation Guidelines, and a Motion for Emergency Hearing on the Well-Being of the Children in the Petitioner's Custody. On November 29, 2004, Stephanie filed three motions with the trial court: a Verified Petition to Modify Parenting Time, a Petition for a Parenting Time Evaluation, and Modification of Child Support to Include College Expenses. Due to several continuances requested by both parties, the hearing on the pending petitions was not held until January 23, 2006, and the trial court issued its order resolving these issues on February 9, 2006. It found Daniel in contempt of court, denied each of Daniel's motions to find Stephanie in contempt, modified Daniel's parenting time, and awarded Stephanie $10,000 in attorney fees and expenses. Daniel now appeals.

Discussion and Decision

I. Standard of Review

Although the parties did not request it, the trial court included findings of fact and conclusions thereon when it issued the order resolving the litany of pending motions in this case. Where the trial court, sua sponte, enters findings and conclusions, we apply a two-tiered standard of review, first determining whether the evidence supports the findings, and then whether the findings support the judgment. Learman v. Auto Owners Ins. Co., 769 N.E.2d 1171, 1174 (Ind. Ct. App. 2002), trans. denied. Findings and conclusions will be set aside only if they are clearly erroneous, meaning that the record contains no facts or inferences supporting them, and leaves us convinced that a mistake has been made. Id. In this regard, we neither reweigh the evidence nor assess the credibility of witnesses, but

consider only the evidence most favorable to the judgment. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005).

The clearly erroneous standard is defined based upon whether the party is appealing a negative judgment or an adverse judgment. Garling v. Ind. Dep't of Natural Res., 766 N.E.2d 409, 411 (Ind. Ct. App. 2002), trans. denied. When the party with the burden of proof at trial appeals, he appeals from a negative judgment, and will prevail only if he establishes that the judgment is contrary to law. Todd Heller, Inc. v. Ind. Dep't of Transp., 819 N.E.2d 140, 146 (Ind. Ct. App. 2004), trans. denied. A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. Id.

Lastly, findings made sua sponte control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Fowler, 830 N.E.2d at 102. "A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." Id.

II. Parenting Time

Daniel raises two issues directly related to his parenting time. First, he alleges that the trial court improperly modified the previously ordered visitation with his children. Second, in modifying his visitation, Daniel argues that the trial court erred when it left the decision of when to make gradual increases in his parenting time, and the extent of those increases, to the discretion of the family counselor. We address each in turn.

A. Modification of Daniel's Parenting Time

Indiana Code section 31-17-4-2 governs modification of a trial court's order granting

parenting time rights. Such a modification must be in the best interests of the child, and any restriction of parenting time must result from the trial court's finding that "the parenting time might endanger the child's physical health or significantly impair the child's emotional development." Daniel contends that the trial court's modification of his parenting time included a restriction without the requisite findings. We disagree.

The trial court explicitly found "a substantial and continuous change of circumstances that makes the previous parenting time order . . . no longer in the children's best interest." Appellant's App. at 15. As a result, the trial court modified the decree to implement the Indiana Parenting Time Guidelines rather than the Marion County Visitation Guidelines. However, the trial court also imposed a temporary restriction on parenting time as follows:

> Parenting time shall continue on alternating weekly Saturdays on one week and Sundays on the next week for 2 hours each time at the mall or other public places as the parties agree in writing until such time as the family counselor, after consultation with Father's counselor, and the [Parenting Coordinator,] indicates there shall be an increase. The family counselor shall set the increases and delineate[] children involved and all changes to the above parenting time each time there is a change until the Parenting Time Guidelines are appropriate, recommended, and ordered by this Court.

Appellant's App. at 23-24. Daniel contends that this restriction was erroneous because the trial court's findings do not reflect danger to the children's physical health or emotional development.

However, the trial court's modification clearly rests upon ramifications to the children's emotional well-being. It notes,

> This two year period of absence voluntarily by Father has negatively impacted the children and their relationship with him. The disruption in Father's relationship with the children and his lengthy absence from them makes the previous order no longer reasonable nor in the children's best interest. The

> Court finds that a gradual resumption of parenting time with the counseling assistance set out . . . is in the children's best interest.

Id. at 15. More specifically, the trial court's cumulative findings suggest that Daniel's estrangement from his children, and his lack of appreciation for how his behavior affects the children's views of him and of spending time with him, has resulted in the children suffering anxiety and resentment against Daniel. Id. at 15-16. As such, we cannot say the trial court erred when it concluded that restriction of Daniel's parenting time was warranted because full resumption of parenting time might further significantly impair the children's emotional development.

B. Delegation of Parenting Time Determinations

Daniel also asserts that permitting the family counselor to decide when gradual increases in his parenting time should be made was an impermissible delegation of the trial court's authority. Relying on our decision in Matter of Paternity of A.R.R., 634 N.E.2d 786 (Ind. Ct. App. 1994), he argues that only the trial court has the authority to make these changes. In A.R.R., the trial court delegated discretion over the supervision status and frequency of a mother's visitation with her child. In particular, the trial court ordered that visitation "continue with the same frequency and duration that is now occurring. This Visitation is to be fully supervised until Family Connection Center feels mother is no longer acting against Family Connection Center's rules. Visitation is to be increased upon therapist's recommendations . . . ." Id. at 789. We concluded that the language of the statute[1] required any modification in visitation to follow a determination by the trial court—

[1] Our decision in A.R.R. was based upon Indiana Code section 31-6-6.1-12, which was repealed

not a caseworker, probation officer, guardian, or other authority—that it was in the best interests of the child. Therefore, "[b]y authorizing the Family Connection Center to determine when supervised visitation is no longer needed and when the frequency of visitation may be increased, the court impermissibly endowed that agency with judicial powers." Id.

Likewise, here the trial court authorized the family counselor to determine whether an increase in Daniel's parenting time, and the degree of that increase, is in the best interests of the children. Each gradual increase, then, would be a modification without the participation and approval of the trial court. The governing statute does not contemplate such modification, and doing so would "undermine the safeguards inherent in reserving to a detached and impartial court the task of weighing the many considerations relevant to [parenting time]." Id.

Stephanie argues that the trial court provided adequate safeguards in three ways: involving a third-party Parenting Coordinator, requiring the family counselor to provide notice of an increase in parenting time to each party and their attorneys, and a review hearing process. However, the review hearing ordered by the trial court was only for review of general progress during the summer of 2006, and was not a mechanism intended for challenges to the family counselor's determinations. Secondly, the notice requirement does not address concerns of authority reserved to the judiciary for weighing the considerations relevant to parenting time. Lastly, although the trial court explained that the Parenting Coordinator functions as an officer of the court, it also restricted the Parenting Coordinator

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but is substantially similar to Indiana Code section 31-17-4-2.

from "attempt[ing] to exercise judicial authority" and "substantially alter[ing] the percentage of parenting time between [the] parents." Appellant's App. at 20. Furthermore, the decision to increase parenting time was delegated to the family counselor, not the Parenting Coordinator.

We note that in Finding 19 the trial court reserved for itself the ultimate decision of when Daniel would enjoy the fullness of his parenting time rights under the Indiana Parenting Time Guidelines. That same authority must also be used by the trial court in making the gradual increases to Daniel's parenting time. The roles and responsibilities of Daniel's counselor, the Parenting Coordinator, and the family counselor need not change beyond an adjustment reserving for the trial court the determination of whether to implement each gradual increase in Daniel's parenting time with respect to the best interests of the children. The trial court may properly rely upon the family counselor's proposal and recommendations regarding such increases, but cannot vest the family counselor with the authority to modify Daniel's parenting time.

III. Contempt of Court

Daniel does not dispute the trial court's conclusion that he was in contempt of court for his willful failure to make payments required in the divorce decree. Rather, he argues on appeal that the trial court erred in declining to issue a finding of contempt against Stephanie for limiting his parenting time. The trial court exercises its discretion when determining if a party is in contempt. Marks v. Tolliver, 839 N.E.2d 703, 707 (Ind. Ct. App. 2005). We will reverse the trial court's finding only where an abuse of discretion has been shown, which occurs only when the trial court's decision is against the logic and effect of the facts and

circumstances before it. Id. We neither reweigh the evidence nor judge the credibility of the witnesses. Id.

Indirect contempt occurs through actions that undermine the orders or activities of the trial court. In re Contempt of Wabash Valley Hosp., Inc., 827 N.E.2d 50, 62 (Ind. Ct. App. 2005). "Willful disobedience of any lawfully entered court order of which the offender had notice is indirect contempt." Francies v. Francies, 759 N.E.2d 1106, 1118 (Ind. Ct. App. 2001), trans. denied. Moreover, "[u]ncontradicted evidence that a party is aware of a court order and willfully disobeys it is sufficient to support a finding of contempt." Evans v. Evans, 766 N.E.2d 1240, 1243 (Ind. Ct. App. 2002). However, the "primary objective" of a trial court's use of its inherent civil contempt power "is not to punish the contemnor but to coerce action for the benefit of the aggrieved party." Thompson v. Thompson, 811 N.E.2d 888, 905 (Ind. Ct. App. 2004), trans. denied.

The basis for Daniel's contempt allegation against Stephanie is that she "unilaterally denied parenting time to [Daniel], citing various concerns about the welfare of the children, [without] obtaining authority to so modify the previously ordered . . . parenting time schedule." Appellant's Brief at 14. The trial court acknowledged this in Finding 7 of its order, where it stated in part, "Mother has permitted the children to control parenting time rather than returning to Court to seek modification and Court approval for deviating from the Court's prior Orders." Appellant's App. at 15. Nonetheless, it did not find Stephanie in contempt.

To be in contempt for violation of a court order, a party must act with willful disobedience. Norris v. Pethe, 833 N.E.2d 1024, 1029 (Ind. Ct. App. 2005). Where a party

fails to act according to the requirements of a court decree, he or she bears the burden of establishing that the non-compliance was not willful. Id. Here, Stephanie does not dispute that she withheld visitation from Daniel, immediately preceding her Petition to Modify Parenting Time and while it was pending before the trial court.

We have consistently held that the decision to alter parenting time is to be made by the trial court, not the custodial parent. For instance, in Piercey v. Piercey, 727 N.E.2d 26, 32 (Ind. Ct. App. 2000), we stated that terminating visitation at the children's request because the children were afraid of their father, or had nightmares, was not a legitimate reason to do so. Likewise, in Hartzell v. Norman T.L., 629 N.E.2d 1292, 1294 (Ind. Ct. App. 1994), we reiterated that a parent's noncompliance with court ordered visitation cannot be justified by a child's desire not to participate. We also explained that where the custodial parent is concerned about a child's well-being during visitation, the parent's remedy is to seek modification of the court order. Id. at 1295. Here, Stephanie's petition for modification of the order does not lessen or remove her obligation to comply with the order while the outcome of her petition is pending.

Stephanie relies on the outcome in Piercey to argue that the trial court did not err when it did not find her in contempt. In Piercey, a panel of this court affirmed the trial court's determination, based on the evidence at trial, that a mother's denial of visitation was not willful, therefore precluding a finding of contempt. 727 N.E.2d at 32. However, Piercey is distinguishable on the facts and circumstances of the present case. Here, Stephanie was aware that the divorce decree required visitation pursuant to Marion County's guidelines, and that she needed to follow the procedure of requesting modification rather than unilaterally

denying Daniel's parenting time. Transcript at 211-12. Nevertheless, when Daniel expressed a renewed interest in his parenting time, Stephanie refused and limited Daniel's visitation with the children. Her rationale was, "I'm their mother and they have to be—I'm in charge of making sure they are safe." Id. at 211. While this sentiment is understandable, it stretches credulity to conclude that her actions in this regard were not willful. Therefore, the trial court's determination that Stephanie was not in contempt is against the logic and effect of the facts and circumstances, and it erred.

Even so, it was harmless error. Setting aside the impermissible delegation of authority to the family counselor, the trial court properly modified Daniel's parenting time, implementing a process of gradual increases until full visitation commensurate with the Indiana Parenting Guidelines is in the best interests of the children. As such, requiring "make-up time" as proposed by Daniel as a remedy for Stephanie's actions would do nothing to coerce action benefiting him. Indeed, compelling visitation beyond the gradual increases proscribed by the trial court would not be in the best interests of the children, and could counteract progress achieved toward reconciliation and the reestablishment of trust between Daniel and his children. Moreover, as punishment is not the purpose of civil contempt, Daniel's request for "sanctions sufficient to impress upon [Stephanie] the seriousness of her transgression" is clearly inappropriate. Appellant's Br. at 17.

IV. Attorney Fees and Expenses

Stephanie submitted to the trial court an affidavit and breakdown of her attorney fees and legal expenses starting in November of 2004, after Daniel began making his several motions to the trial court, to which Stephanie responded and presented her own petitions, and

ending in January of 2006, prior to the trial court's order resolving all matters before it. These legal fees and expenses totaled $20,372.40. Appellant's App. at 194. The trial court ordered Daniel to pay a portion of these fees in the amount of $10,000. Daniel now argues that this award was excessive and improper.

Indiana Code section 31-17-7-1 gives a trial court discretion to award attorney fees and the costs of maintaining or defending actions involving custody and parenting time. This discretion is further defined by Indiana Code section 31-17-4-3, which provides:

> (a) In any action filed to enforce or modify an order granting or denying parenting time rights, a court may award:
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> (1) reasonable attorney's fees;
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> (2) court costs; and
>
> (3) other reasonable expenses of litigation.
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> (b) In determining whether to award reasonable attorney's fees, court costs, and other reasonable expenses of litigation, the court may consider among other factors:
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> (1) whether the petitioner substantially prevailed and whether the court found that the respondent knowingly or intentionally violated an order granting or denying rights; and
>
> (2) whether the respondent substantially prevailed and the court found that the action was frivolous or vexatious.

Additional considerations by the trial court may include the resources of the parties, the relative earning ability of the parties, and other factors that bear on the reasonableness of the award. Barger v. Pate, 831 N.E.2d 758, 765 (Ind. Ct. App. 2005). The trial court's decision to award attorney fees will only be reversed if the decision is clearly against the logic and effect of the facts and circumstances. Id.

The trial court awarded Stephanie attorney fees and costs based on her expenditure of "attorney fees to attempt to secure the moneys due and owing her" from Daniel, who the trial court concluded was in contempt. Appellant's App. at 14. The trial court also found that

much of the delay in resolving the issues before it since the fall of 2004 was attributable to Daniel, and this delay increased the costs of litigation. Moreover, Stephanie substantially prevailed against Daniel in resolution of these issues. Although the trial court made no findings with regard to the comparative economic situations of the parties, it considered various factors bearing on the reasonableness of the award. Therefore, we cannot say the trial court erred when it ordered Daniel to pay a portion of Stephanie's attorney fees and legal expenses accrued between November of 2004 and January of 2006.

Conclusion

The trial court properly modified Daniel's parenting time by implementing gradual increases until such time as full parenting time under the Indiana Parenting Time Guidelines is in the best interests of the children. However, its delegation of authority to the family counselor to decide when these increases should happen, and the extent to which parenting time should be increased, was an abuse of discretion. We therefore reverse and remand this portion of the trial court's order for adjustment to reserve this determination for the trial court based on the recommendations of the family counselor and in light of the best interests of the children. The trial court also erred when it failed to find Stephanie in contempt of the divorce decree due to her actions withholding parenting time from Daniel, but this error was harmless. Lastly, the trial court's order for Daniel to pay a portion of Stephanie's attorney fees and expenses was both reasonable and proper, and is therefore affirmed.

Affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and BARNES, J., concur.